

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CMC INDUSTRIES, INC., and
CMC MISSISSIPPI, INC. PLAINTIFFS

vs. Civil Action No. 1:98cv4-D-D

HOFOWELL, INC., d/b/a The Rib Cage
and ALEX HOMRA DEFENDANTS

MEMORANDUM OPINION

Presently before the court is the motion of the plaintiff Circuit Court of Alcorn County, Mississippi. Finding shall grant the motion and return this matter to state court.

In this case, the plaintiffs seek remand based upon a defect in the removal procedure, *i.e.*, the defendants' failure to file its notice of removal "within thirty days after the receipt by the defendant, *through service or otherwise*, of a copy of the initial pleading setting forth the claim for relief upon which action or proceeding is based . . ." 28 U.S.C. § 1446(b) (emphasis added).

It appears undisputed that at least as early as November 11, 1997, the plaintiff received a copy of the complaint of this cause which had already been filed in Alcorn County on November 17, 1997. In a letter dated November 19, 1997, the plaintiff communicated to defense counsel:

In response to your letter to William N. Reed enclosing Waivers of Process for your client's second complaint filed in Alcorn County.

Exhibit "1" to Plaintiffs' Motion, Letter Dated 11/19/97 from Hinton. Defense counsel received this letter at least on November 19, 1997. He sent a response requesting a different form for the Plaintiff's Motion, Letter Dated 11/19/97 from Phil Hinton. As the plaintiffs' counsel correctly notes, the Fifth Circuit has

statutory phrase contained in 28 U.S.C. § 1446(b) in “courtesy copy” of the complaint in a case that has : Stores, 98 F.3d 839, (5th Cir. 1996) (“[T]he statute ex removal occur as soon as possible, *i.e.*, within thirty d pleading or other paper confirming that a removable also McKnight v. Illinois Cent. R.R., 967 F. Supp 18 the statute, the thirty-day period begins when the de pleading through any means, not just service of proc As the defendants knew at least as early as Novemb been filed against them, they should have filed their December 24, 1997. Instead, they did not file a noti

The defendants essentially make two points in re Both of their arguments¹, however, rely upon the fac been filed in the case at bar at the time they received correspondence with plaintiff’s counsel dated Nove Spangle, 975 F. Supp. 973, 977 (S.D. Tex. 1997) (de of complaint *not yet filed in state court* did not trigger running of

In the present case, the Complaint had not been : received a courtesy copy [with the November 14 counsel made no attempt to provide defense cou Complaint had been filed. Rather, . . . they mere copy.

Defendants’ Response Brief, p. 3. Regardless of thi an unexecuted, unfiled complaint, it appears without

¹ The defendants also argue that utilizing a literal application of §1446(b) would require them to waive objections to service of process, jurisdiction and venue. The Fifth Circuit has already addressed this contention in Reese:

Even if we assume, *arguendo*, that a defendant might waive state service-of-process requirements or other protections by removing, the plain language of § 1446(b) does not thereby produce an *absurd* result; instead, it reflects a legislative policy judgment that the receipt rule’s benefits outweigh its detriments. Reese, 98 F.3d at 842 (emphasis in original).

with the November 19 letter a copy of the executed court on November 17. Ms. McMurtray's November complaint had already been filed in state court. In light of the defendants' favor that they did not obtain a copy of the letter until the date of Mr. Hinton's response to the November 19 letter, the court nevertheless filed approximately two weeks late. While the court has the equitable power to consider "exceptional circumstances," the undersigned fails to see any equitable justification for the late filing of removal. Reese, 98 F.3d at 842. Therefore, this removal was filed outside of the required time frame. In such circumstances, the plaintiffs' motion to remand shall be granted to the Circuit Court of Alcorn County, Mississippi.

A separate order in accordance with this opinion is being entered.

This the _____ day of April 2001.

United States District Judge

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ORDER GRANTING MOTION TO REMAND

Pursuant to a memorandum opinion issued this day
) the plaintiffs' motion to remand is hereby GRANTED.
) this cause is hereby REMANDED to the Circuit Court of
 Mississippi.

SO ORDERED, this the _____ day of April 200

United States District Judge